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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 665

LOUISE TUCKER BENNETT, JAMES ROBERTSON, JULIAN MAY JACKSON, suing by his mother and next friend Corine Jones and SAMUEL R. PERRYMAN, each individually and on behalf of all others similarly situated,

Appellants,

—v.—

D. S. COTTINGHAM, GEORGE E. DAILEY, GLENN TIBBS, LOUIE BOGGS, LLOYD ROWE, ALICE PRATT, CLIFFORD WARD, FREEMAN MURPHY, Justices of the Peace in Bibb County, Alabama; HAROLD DAILEY, Sheriff of Bibb County, Alabama; McDONALD GALLION, Attorney General of the State of Alabama and GEORGE WHITE, County Solicitor of Bibb County, Alabama,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

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IN THE

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LOUISE TUCKER BENNETT, JAMES ROBERTSON, JULIAN MAY JACKSON, suing by his mother and next friend Corine Jones and SAMUEL R. PERRYMAN, each individually and on behalf of all others similarly situated,

Appellants,

—v.—

D. S. COTTINGHAM, GEORGE E. DAILEY, GLENN TIBBS, LOUIE BOGGS, LLOYD ROWE, ALICE PRATT, CLIFFORD WARD, FREEMAN MURPHY, Justices of the Peace in Bibb County, Alabama; HAROLD DAILEY, Sheriff of Bibb County, Alabama; MCDONALD GALLION, Attorney General of the State of Alabama and GEORGE WHITE, County Solicitor of Bibb County, Alabama,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the court below is as yet unreported and is set forth in the Appendix, p. 1a, *infra*.

Jurisdiction

This is a civil action brought pursuant to 28 U. S. C. §§1343 and 2201 and 42 U. S. C. §1983 for declaratory and injunctive relief against the operation of statutes of the State of Alabama which provide a pecuniary inducement to the performance of official acts of justices of the peace and sheriffs in Alabama.

The judgment of the United States District Court for the Northern District of Alabama was entered June 27, 1968 (R. 56; App., pp. 10a-11a, *infra*).[1] Timely notice of appeal to this Court was filed August 21, 1968 (R. 58).

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1253 to review the judgment of the district court of three judges necessarily convened pursuant to 28 U. S. C. §2281. See, e.g., *Harper* v. *Virginia State Board of Elections*, 383 U. S. 663 (1966).

Question Presented

Does a state practice of paying law enforcement officers only if they make a minimum number of arrests offend the Fourteenth Amendment to the Constitution of the United States?

Statement of the Case

Bibb County, Alabama is a rural county through which pass three major highways (R. 52; Tr. 125; App., p. 4a, *infra*). The Mayor of Centreville, the county seat of Bibb

[1] "R." refers to the record of pleadings and orders, which is paginated independently of the transcript of the trial below, refered to herein as "Tr."

County, testified concerning the conduct of the Sheriff's office, especially with respect to enforcement of highway laws (Tr. 22-23):

> We had received complaints from all over the state, people everywhere, that they could not get through Bibb County. We had received complaints from Negroes in Jefferson County . . . I would say a large percentage of the Negroes of Jefferson County are made up of Negroes who formerly lived in the Black Belt and . . . have migrated to the larger cities.
>
> Usually on Friday afternoon, a lot of these Negroes will start back to visit some of their folks who live in the Black Belt, and there are always a large number of cars on Friday and Saturday, and they would start back to Birmingham on Sunday. It was hard for them to get through Bibb County, the Negro population, and it was hard for white people, especially the out of county people. The records will show a large percentage of the people that were caught in this speed trap were out of county folks.

Sheriff Harold Dailey of Bibb County maintains and must pay a staff of three full-time deputies and one part-time deputy, a bookkeeper and a jailer (R. 50; Tr. 58-61, 65-66; App., p. 3a, *infra*). The expenses of his office average about $3,000 per month (Tr. 38-49; Plaintiffs' Exhibits 3-6).[2] He receives a salary of $50 per month for services

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[2] In 1967, the office paid an average of approximately $1,250 per month to the Sheriff's employees and expended an average of approximately $1,750 per month for maintenance of patrol cars and the jail and for miscellaneous expenses.

Salary items paid to two of the Sheriff's deputies by the County Board of Revenue are excluded from these figures. See notes 5, 6, *infra*. The salaries account for less than half of the acknowledged compensation of the deputies, do not flow through the Sheriff's office, and are not material to the financial operations of the office.

rendered respecting elections (R. 50; Tr. 72-73; App., p. 3a, *infra*). He also receives about $200 per month from the State for maintaining prisoners in the county jail (Plaintiffs' Exhibit 21). The only remaining acknowledged source of income of the office is the fee he receives for each arrest (R. 50; Tr. 40-41, 59, 61; App., p. 3a, *infra*). See Code of Ala. Tit. 11, §100.[3] Accordingly, in order to meet the expenses of his office—and to make a living wage for himself—he and his deputies must make a sufficient number of arrests. This they do.

The Sheriff and his deputies make enough arrests to bring in an average of approximately $3,000 per month in fees.[4] The Sheriff may elect to charge an offense in either the Justice of the Peace Court or the Circuit Court (Tr. 139-40). In the Justice of the Peace Court, where the Sheriff prosecutes the offense, the Sheriff receives his fee only upon conviction (R. 50; Tr. 62; App., p. 3a, *infra*). In the Circuit Court, only the Sheriff's mileage fee (see note 3, *supra*) is lost if there is no conviction (R. 50; Tr. 62; App., p. 3a). In 1967, income from the Justice of the Peace Court averaged approximately $1,650 per month (Plaintiffs' Exhibit 20); income from the Circuit Court averaged approximately $1,300 per month (Plaintiffs' Exhibits 18, 22). The Sheriff pays his chief deputy $2.00 per arrest for each arrest in excess of an office threshold of 100 arrests per month (R. 51; Tr. 50, 127; App., p. 3a,

[3] The components of the fee are: $5.00 for the statutory fee for arrest prescribed by Code of Ala. Tit. 11, §100; $2.00 for the statutory bond fee prescribed by §100; $.75 as a witness fee; and a mileage fee. See Tr. 54. The Sheriff could give no explanation for the fact that the fee in a great number of cases amounted to $14.90 (Tr. 56; Plaintiffs' Exhibit 20).

[4] In 1967, the average fee amounted to $14.22 per arrest (Plaintiffs' Exhibit 20; Tr. 86-89).

infra).[5] Another deputy is paid $1.00 per arrest for each arrest in excess of this office threshold (R. 51; Tr. 59; App., p. 3a, *infra*).[6] Justice of the Peace George E. Dailey, uncle of the Sheriff, and other justices receive $3.00 per case if they convict, but nothing if they acquit (R. 51; App., pp. 3a-4a, *infra*).

In response to complaints of a speed trap in Bibb County, the Alabama Motorists Association commissioned an independent audit of the fees paid to the Sheriff (Tr. 35-36). This audit revealed a dramatic increase in recent years in the Sheriff's earnings. See Plaintiffs' Exhibit 20; Tr. 87-89. In the Justice of the Peace Court alone, the Sheriff's income rose from $1,137.00 (137 arrests) in 1962 to $19,680.00 (1384 arrests) in 1967.[7]

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[5] The chief deputy receives a salary of $355 per month from the County Board of Revenue. This sum does not flow through the Sheriff's office, and it is not included in the statement of expenses of the office—about $3,000 per month—in text, *supra*. The chief deputy's incentive pay from the Sheriff (which is included in the statement of office expenses) exceeds the salary paid by the Board of Revenue (Tr. 136-37).

[6] This deputy receives a salary of $200 per month from the County Board of Revenue (Tr. 59). This sum does not flow through the Sheriff's office, and it is not included in the statement of expenses of the office—about $3,000 per month—in text, *supra*. This deputy's incentive pay from the Sheriff (which is included in the statement of office expenses) exceeds the salary paid by the Board of Revenue (Plaintiff's Exhibit 29).

[7] The increasing lucrativeness of the Sheriff's practice may be tabulated as follows:

Year	Number of Arrests	Sheriff's Fees	Average Sheriff's Fee
1962	137	$ 1,137	$ 8.30
1963	276	3,173	11.50
1964	404	4,767	11.80
1965	585	6,905	11.80
1966	1018	13,625	13.38
1967	1384	19,680	14.22

On November 30, 1967, appellants Bennett, Jackson and Robertson, Negro licensed motorists residing outside Bibb County, filed an action in the United States District Court for the Northern District of Alabama, pursuant to 28 U. S. C. §§1343 and 2201 and 42 U. S. C. §1983, seeking injunctive and declaratory relief against the fee practices of the Sheriff and the Justices of the Peace of Bibb County and the state statutes supporting those practices (R. 1-9, 49-50; App., p. 2a, *infra*).

Appellants Bennett and Jackson had previously been arrested, tried and convicted for highway violations in Bibb County. They had paid the fees for their arrests and convictions to the Sheriff and the Justices of the Peace respectively (R. 50; App., p. 2a). Appellant Robertson had been arrested for a highway violation but had not yet been tried by Justice of the Peace Dailey (R. 50; App., p. 2a).

Appellants claimed that both the Sheriff and the Justices of the Peace had a "direct, personal, substantial pecuniary interest" in arresting, prosecuting and convicting them, contrary to the Fourteenth Amendment to the Constitution of the United States (*Tumey* v. *Ohio,* 273 U. S. 510, 523 (1927)) (R. 3).

On December 5, 1967, District Judge H. H. Grooms issued a temporary restraining order, with notice, restraining Robertson's prosecution before Justice Dailey (R. 16-21).

On December 12, 1967, the Chief Judge of the Court of Appeals for the Fifth Circuit designated a three-judge district court pursuant to 28 U. S. C. §2281 to hear and determine the action (R. 23-24).

On December 18, 1967, Sheriff Dailey filed an answer admitting that an actual controversy existed between him-

self and the appellants, but denying that his pecuniary interest in arresting and prosecuting the appellants violated any of their federal constitutional rights (R. 35).[8]

Subsequent to the issuance of Judge Grooms' temporary restraining order, the number of highway violations instituted by the Sheriff in the Circuit Court increased, while the number instituted in the Justice of the Peace Court declined (Plaintiffs' Exhibit 18). On January 25, 1968, appellants filed, with leave of the Court, an amendment to the complaint alleging this shift in practice and praying that the Court declare the Sheriff's fee arrangement unconstitutional, irrespective of whether fees were earned in the Circuit Court or the Justice of the Peace Court (R. 39-41). Sheriff Dailey, in an amended answer, admitted that highway violations were being made returnable to the Circuit Court (R. 46).

After trial on the merits, on June 27, 1968, the district court held that Code of Ala. Tit. 11, §§96 and 97, which provide for taxation of Justices' fees as costs upon conviction, were unconstitutional in their application to fines and costs collected for highway violations by Justices of the Peace (R. 56; App., p. 10a, *infra*). The Court relied upon *Tumey* v. *Ohio, supra,*[9] and *Hulett* v. *Julian,* 250 F. Supp.

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[8] The answer stated, *inter alia* (R. 35):

> Defendant . . . admits there is an actual controversy between the plaintiffs and the defendants, sheriff and Justices of the Peace; however, the defendant Harold Dailey denies that he makes the arrests solely for the fees involved.

[9] *Tumey* held that "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case" (273 U. S. at 523).

208 (M. D. Ala. 1966) (three-judge court) (R. 52-54; App., pp. 5a-7a, *infra*).

But the court held that the Sheriff's pecuniary interest in arresting and prosecuting did not offend the Fourteenth Amendment. The court expressly "decline[d] to extend *Tumey* to include the Sheriff and his deputies" (R. 55; App., p. 8a, *infra*). Accordingly, the court dismissed Sheriff Dailey as a party defendant (R. 57; App., p. 11a, *infra*).

From so much of the judgment as dismissed the action against Sheriff Dailey, appellants took the instant appeal.[10]

The Question Presented Is Substantial

Whether a State Practice Which Requires Law Enforcement Officers to Meet a Quota of Arrests in Order to Receive Compensation Can Be Squared With the Fourteenth Amendment Is a Substantial Question Requiring Resolution by This Court.

The record in this case demonstrates that the Sheriff of Bibb County cannot meet the expenses of his office—or even make a living—unless he and his deputies meet a minimum quota of arrests. This practice of making a police officer's livelihood depend on an arrest quota cannot be squared with due process of law.

No extended argument should be needed to demonstrate that an arrest is a significant deprivation of liberty which cannot constitutionally be made arbitrarily, discriminatorily or pursuant to an official's personal interest. The revulsion to the *lettre de cachet* which the Framers of the Con-

[10] Appellants' timely notice of appeal was filed August 21, 1968 (R. 58).

stitution expressed in the Fourth Amendment suffices to establish that proposition. And this Court has recently recognized the gravity, and consequent claim to constitutional limitation, of police practices whose intrusions upon the liberty of the citizen were substantially less severe than those of an arrest. *Terry* v. *Ohio,* 392 U. S. 1 (1968); *Sibron* v. *New York,* 392 U. S. 40 (1968).

When an officer makes an arrest without a warrant, the Fourth and Fourteenth Amendments require that he make a judgment of probable cause. Whatever else this judgment may imply, surely it supposes at the least an impartial assessment of the facts and an informed application to them of the proper legal standard. It is in the light of these elemental principles that petitioner's constitutional submission in the present case, which the court below rejected, takes on its clear import and importance. We urge, simply, that in making the arrest decision, an officer is constitutionally required "to hold the balance nice, clear and true" between the State and the citizen (*Tumey* v. *Ohio, supra,* 273 U. S. at 532), free, at least, from the gross biasing force of a direct financial inducement to arrest.

Where, as here, the State maintains a practice which generates in law enforcement officers such a direct, personal and substantial pecuniary inducement to arrest citizens, "[t]he scales of justice are thereby weighted" against citizens' liberty (R. 53; App., p. 6a, *infra*). The inducement here is not marginal; the Sheriff must either maintain a high volume of arrests or go unremunerated. And when the Sheriff elects to proceed in the Justice of the Peace Court, he must do far more than arrest to secure his fees. He must prosecute, and usually he must testify, in order to secure a conviction.

The court below held that sheriffs and their deputies were to be excluded from the operation of the *Tumey* doctrine that a citizen's liberty may not be conditioned upon the discretion of an official who has a direct, personal and substantial pecuniary interest in depriving him of his liberty (R. 55; App., p. 8a, *infra*). The court derived this conclusion from the following quoted language in *Tumey*, 273 U. S. at 535 (R. 55; App., p. 8a, *infra*):

> It is further said with truth that the legislature of a state may and often ought to stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the state and the people. The legislature may offer rewards or a percentage of the recovery to informers. United States v. Murphy & Morgan, 16 Pet. 203. It may authorize the employment of detectives.

Other courts have not so lightly assumed that evolving notions of due process are entirely without relevance to the bounty system of compensating even informers. Compare *Williamson* v. *United States*, 311 F. 2d 441 (5th Cir. 1963), with *Hill* v. *United States*, 328 F. 2d 988 (5th Cir. 1964).

But, however this may be, we submit the Court should decisively reject the notion that a State or its subdivision may condition the remuneration of policemen and prosecutors upon the fulfillment of a quota of arrests and prosecutions, as if it were paying rewards to informers.

The analogy simply does not comport with reality. As the President's Commission on Law Enforcement and the

Administration of Justice said in its Task Force Report, "The Police," p. 189 (1967):

> Police work is far too complicated and delicate a job to judge an officer's work or qualifications for promotion on the number of arrests he has made. Furthermore, arrest quotas, if they exist as either explicit requirements or implied expectations, can lead to improper activity by policemen. Patrolling officers have the complex and difficult responsibility of exercising their discretion based on the circumstances of the particular case. No part of this calculation should consist of the number of arrests the officer has made in comparison to a preestablished quota or expectation set by the department.

Here, not simply the officer's advancement but his very livelihood depends on his meeting his quota of arrests.

Moreover, this pecuniary inducement to arrest and prosecute creates an evident potential for "improper activity" endangering the right of a person not to be denied equal protection of the laws. There was testimony below that Negroes and out of county motorists were made to bear the major financial burden of the Sheriff's operation (see Tr. 22-23). This is hardly surprising, since an elected sheriff would obviously prefer to impose the major financial burden of his office on nonvoting motorists.[11]

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[11] The voting age population in Bibb County is approximately 25% Negro. The percentage of Negroes registered to vote is just under 50%, while the percentage of whites registered to vote is over 100%. See United States Commission on Civil Rights, "Political Participation," pp. 224-25 (1968).

No police officer, no matter how high-minded or impractical, could be expected to ignore the financial pressures imposed on him by the State and County. But even if such an officer could be found, "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice" (*Tumey, supra,* 273 U. S. at 532).

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

Opinion Below

In the

UNITED STATES DISTRICT COURT

For the Northern District of Alabama

Western Division

Civil Action No. 67-640

Mrs. Louise Tyrone Bennett, Mr. James Robertson, Mr. Julian May Jackson, suing by his mother and next friend, Mrs. Celine [illegible] individually and on behalf of all others similarly situated,

Plaintiffs,

—vs.—

The Honorable [illegible] Carmichael, George E. Dailey, Glen Tubb, [illegible] Jones, Lloyd Rowe, Alice Pratt, Clarence Wade, Thomas Murphy, Justices of the Peace in Bibb County, Alabama; The Honorable Harold Dailey, Sheriff of Bibb County, Alabama; The Honorable MacDuff [illegible], Attorney General of the State of Alabama; The Honorable George White, County Solicitor of Bibb County, Alabama; *et al.*,

Defendants.

APPENDIX

Opinion Below

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

WESTERN DIVISION

Civil Action No. 67-640

MRS. LOUISE TUCKER BENNETT, MR. JAMES ROBERTSON, MR. JULIAN MAY JACKSON, suing by his mother and next friend, Mrs. Corine Jones, each individually and on behalf of all others similarly situated,

Plaintiffs,

—VS.—

THE HONORABLE D. S. COTTINGHAM, GEORGE E. DAILEY, GLEN TIBBS, LOUIE BOGGS, LLOYD ROWE, ALICE PRATT, CLIFFORD WARD, FREEMAN MURPHY, Justices of the Peace in Bibb County, Alabama; THE HONORABLE HAROLD DAILEY, Sheriff of Bibb County, Alabama; THE HONORABLE MACDONALD GALLION, Attorney General of the State of Alabama; THE HONORABLE GEORGE WHITE, County Solicitor of Bibb County, Alabama; *et al.*,

Defendants.

Before GODBOLD, *Circuit Judge,* and GROOMS and ALLGOOD, *District Judges.*

GROOMS, *District Judge*:

Plaintiffs are Negroes and bring this action on their own behalf and on behalf of all other persons similarly situated, both as Negroes and as non-resident motorists, pursuant to Rule 23 F. R. C. P. The jurisdiction of the Court is grounded in Sections 1343 and 2201 of Title 28 U. S. C. The suit is filed under Title 42 U. S. C. § 1983 to prevent the deprivation under color of State laws of rights, privileges and immunities secured by the Constitution of the United States, and particularly by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution.

Plaintiffs challenge the constitutionality of Sections 96 and 97 of Title 11, Section 418 of Title 13, and Section 53 of Title 36 of the Code of Alabama, 1940.

Plaintiffs are duly licensed motorists residing outside of Bibb County, Alabama. Plaintiff Mrs. Louise Tucker Bennett was arrested for speeding on May 21, 1967, and was fined by defendant D. S. Cottingham, a Justice of the Peace of Beat 4, Bibb County.

Plaintiff Julian May Jackson was arrested for speeding on September 8, 1967, and was fined by George E. Dailey, Justice of Peace of Bibb County at West Blocton.

Plaintiff James Robertson was arrested on November 12, 1967, gave bond in the amount of $100.00, and was cited to appear before Justice Dailey on November 18, 1967. He did not appear; his bond was subject to forfeiture, and he was subject to arrest at the time of the institution of this action. All of these arrests were made by deputy sheriffs

of Bibb County. Upon the hearing herein each plaintiff denied that he or she was speeding.

Other than Cottingham and Dailey, Justices of the Peace Glen Tibbs, Louie Boggs, Lloyd Rowe, Alice Pratt, Clifford Ward and Freeman Murphy are defendants herein. Harold Dailey, Sheriff of Bibb County, George White, Solicitor of that County, MacDonald Gallion, Attorney General of the State of Alabama, L. S. Moore and James Hare, Circuit Judges of the Fourth Judicial Circuit, are also parties defendant.

Sheriff Dailey has a staff of three full-time deputies and one part-time deputy, a bookkeeper and a jailer. Except for $50.00 per month which he receives for services rendered respecting elections, he is on a fee basis. If he or his deputies make an arrest and the case goes to the Circuit Court, or is appealed from a Justice of the Peace to that court, he is paid the statutory fees (Title 11 § 100) whether or not there is a conviction. If a case goes before a Justice of the Peace and is there disposed of, he is paid the statutory fee only if a conviction is obtained. If there is an acquittal he receives no compensation. One-third or more of his total fees are received from the various Justices of the Peace in Bibb County. There are eight Justices with like authority in the County, but two or three of these try no cases. One appears to act solely as a collector of accounts. The sheriff receives no fees on arrest by the Alabama Highway Patrol. On a conviction one deputy is paid two dollars per case, another one dollar per case over 100 cases in addition to a salary. Another deputy is compensated on a salary basis.

Defendant George E. Dailey, who is an uncle of Sheriff Dailey, has been Justice of the Peace since 1952. He re-

ceives three dollars a case when a party is convicted, but receives no fee when there is an acquittal. In October 1967, he heard 26 cases, four or five of which resulted in acquittals. In November 1967, he heard 37 cases, 32 or 33 of which resulted in convictions. There were no acquittals for the violations of the highway laws for those months.

Defendant D. S. Cottingham assumed office May 2, 1967. Since that time there have been 633 convictions for all offenses in his court. Forty cases were nol prossed. If a case is not made out, there is a nolle prosequi rather than an acquittal. Ninety percent or more of his convictions are for violations of the highway laws. During the period of his incumbency there have been 61 convictions on arrests made by Alabama State Troopers. The troopers are salaried employees of the State and receive no fees.

The evidence establishes the fact that other Justices of the Peace in Bibb County who handle cases follow the same general procedure as that followed by Cottingham and Dailey and receive the same emoluments upon convictions, but not upon acquittals.

Cases in the Justices Court of Bibb County have pyramided since 1962. In 1967 there were 2302 cases involving motorists, 1739 of which were non-residents of the County. A small number only of these were actually tried. A sampling of 529 cases revealed only one trial. Six hundred ninety eight Negroes were involved in these cases.

Bibb County is intersected by Alabama Highway 5, and U. S. Highways 11 and 82. These are heavily travelled, especially on the weekends. Bibb County had a population of 14,440 according to the 1960 census. The evidence does not disclose whether the arrests or convictions of Negroes were out of proportion to the arrests or convictions of whites.

Section 53 of Title 36 provides that all fines and forfeitures collected for violations of the highway laws other than those collected in municipalities of more than 2,000 population shall be forwarded to the State Treasurer and credited to the Highway Patrol fund. Under Section 53(1) it is provided that where the persons convicted have been arrested by the sheriff, or his deputies, or by any other county or municipal law enforcement officer, the fines and forfeitures collected shall be paid into the fine and forfeiture fund of the counties or into the general fund of the counties where there are no fine and forfeiture funds. Plaintiffs have failed to establish any constitutional invalidity in the application of these sections. Certainly no such appears from their face.

Section 418 of Title 13 authorizes a Justice of the Peace to deduct from fines and forfeitures collected by him the amount due for his fees in cases in which the defendant was acquitted, a sum not to exceed fifty dollars for any calendar month. But as conceded by plaintiffs this section has been held not applicable to fines and costs for violations of highway laws. *Ala. Atty. Gen. Quar. Rep., Jan-Mar. 1939,* p. 63, *Oct-Dec. 1939,* p. 78. See *Hulett* v. *Julian* (M. D. Ala.), 250 F. Supp. 208. Only highway violations are here involved. Where no right is brought within the actual or threatened operation of a statute, consideration of its constitutionality will not be undertaken. *United States* v. *Harris,* 74 S. Ct. 808, 347 U. S. 612, 98 L. Ed. 989, 16 C. J. S. Constitutional Law §94, at 313, et seq. Consequently, the Court declines to adjudicate the constitutionality of this section.

Section 96 of Title 11 fixes the fees for various services of Justices of the Peace. Section 97 provides for their taxation as costs and their collection by execution where

no appeal is taken to the circuit court. No provision is made for the assessment and collection of costs where there is an acquittal or disposition other than on conviction. On the contrary it is noted that Section 83(b) provides that:

> "[I]n all trials in the circuit court, or county court, or court of like jurisdiction—*except justice of peace court and courts in lieu of justice of peace courts whose jurisdiction in criminal cases is limited to the jurisdiction of justice of peace courts,* where the state fails to convict, or the indictment abates or is nolle prossed or withdrawn and filed, the fees of the sheriffs and clerks of the court and the state's witnesses shall be paid out of the fine and forfeiture fund. . . " (Emphasis supplied)

Since no provision of law is made for the payment of the fees of Justices of the Peace on charges based upon highway violations in the event of an acquittal or nolle prosequi, Justices of the Peace must go unremunerated unless they convict. The scales of justice are thereby weighted on the side of a conviction. Such a situation is interdicted by the decision in *Tumey* v. *Ohio,* 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, where it was said:

> "[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.
>
> "The Mayor of the Village of North College Hill, Ohio, had a direct, personal, pecuniary interest in con-

victing the defendant who came before him for trial, in the twelve dollars of costs imposed in his behalf, which he would not have received if the defendant had been acquitted. This was not exceptional, but was the result of the normal operation of the law and the ordinance."

See *Hulett* v. *Julian, supra,* where *Tumey* was applied under similar facts to those here involved.

No constitutional infirmity appears from the face of Sections 96 and 97. However, "a statute not objectionable on its face may be adjudged unconstitutional because of its effect in operation." 16 C. J. S. Constitutional Law §97, at 353; *United States* v. *National Dairy Corporation,* 372 U. S. 29, 36, 83 S. Ct. 594, 9 L. Ed. 561; and *Lightfoot* v. *State,* 64 So. 2d 261 (La.). If there was no area in which Sections 96 and 97 could have a constitutional application, it would follow that these sections would be adjudged unconstitutional. But presuming, as we must, the constitutionality of Section 418 of Title 13 until there is an adjudication of its unconstitutionality, Sections 96 and 97 could have an area of constitutional application in relation to Section 418, which as we have noted is without application to cases involving violations of highway laws. With respect to cases of alleged violations of the highway laws, Sections 96 and 97 cannot be constitutionally applied, for in application they give the Justice of the Peace "a direct, personal, substantial, pecuniary interest" in convicting the defendant.

Plaintiffs ask us to extend the doctrine laid down in *Tumey* v. *Ohio, supra,* to fees of the sheriff and his deputies. In short they contend that these officers furnish "the grist for the mills," but there is no averment or proof of

conspiracy between these officers and the Justices of the Peace or other judicial officers with jurisdiction in Bibb County.

A section of the ordinance in *Tumey* provided that detectives and secret service officers should receive compensation for their services in securing evidence necessary to secure convictions, in an amount equal to 15% of the fines collected. The only reference in the opinion that could have application to this provision was the statement of the court that:

> "It is further said with truth that the legislature of a State may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people. The legislature may offer rewards or a percentage of the recovery to informers. United States v. Murphy & Morgan, 16 Pet. 203. It may authorize the employment of detectives."

We have been cited to no authority that would subject the sheriff and his deputies respecting their fees to the doctrine of the *Tumey* case. Although the above observation by the court does not in terminology include sheriffs and their deputies, there is an implication that points in that direction. Under the facts of this case we decline to extend *Tumey* to include the sheriff and his deputies.

For the reasons stated in *Hulett* v. *Julian, supra,* 28 U. S. C. A. §2283 does not bar this Court from enjoining defendant Justices of the Peace.

A decree will be entered in favor of the plaintiffs and all motorists similarly situated and against the defendants, who are Justices of the Peace. A dismissal on the merits will be entered as to the other defendants.

Done, this the 27th day of June, 1968.

/s/ JOHN GODBOLD
United States Circuit Judge

/s/ H. H. GROOMS
United States District Judge

/s/ C. W. ALLGOOD
United States District Judge

Judgment Below

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

WESTERN DIVISION

Civil Action No. 67-640

[Title omitted]

Pursuant to the opinion filed herein in lieu of formal Findings of Fact and Conclusions of Law under Rule 52 F. R. C. P.;

It is ORDERED, ADJUDGED, DECREED and DECLARED as follows:

1. That Sections 96 and 97 of Title 11, Code of Alabama, 1940 be and the same are hereby held to be unconstitutional in their application to fines and costs assessed and taxed and forfeitures entered upon charges of alleged violations of the highway laws of Alabama.

2. That the defendants, D. S. Cottingham, George E. Dailey, Glen Tibbs, Louie Boggs, Lloyd Rowe, Alice Pratt, Clifford Ward, and Freeman Murphy, as Justices of the Peace in Bibb County, Alabama, their successors in office, their agents, servants, employees and attorneys, and those persons in active concert or participation with them, be and each of them is hereby enjoined from trying (which includes accepting pleas of guilty or forfeitures of appearance or other bonds) any cases, future or pending, of alleged violations of the highway laws of Alabama.

3. That this action as to the defendants, Harold Dailey, Sheriff of Bibb County, Alabama; MacDonald Gallion, Attorney General of Alabama; George White, County Solicitor of Bibb County, Alabama; L. S. Moore and James Hare, Judges of the Fourth Judicial Circuit of Alabama, be and the same is hereby dismissed on the merits.

4. That costs of this action are taxed against the defendants named in paragraph 2 hereof.

Done, this the 27th day of June, 1968.

/s/ JOHN GODBOLD
United States Circuit Judge

/s/ H. H. GROOMS
United States District Judge

/s/ C. W. ALLGOOD
United States District Judge

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In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 665

LOUISE TUCKER BENNETT, JAMES ROBERTSON, JULIAN MAY JACKSON, suing by his mother and next friend Corine Jones and SAMUEL R. PERRYMAN, each individually and on behalf of all others similarly situated,

APPELLANTS

versus

D. S. COTTINGHAM, GEORGE E. DAILEY, GLENN TIBBS, LOUIE BOGGS, LLOYD ROWE, ALICE PRATT, CLIFFORD WARD, FREEMAN MURPHY, Justices of the Peace in Bibb County, Alabama; HAROLD DAILEY, Sheriff of Bibb County, Alabama; MacDONALD GALLION, Attorney General of the State of Alabama and GEORGE WHITE, County Solicitor of Bibb County, Alabama,

APPELLEES

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

MOTION TO DISMISS OR AFFIRM

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APPELLEES

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

MOTION TO DISMISS OR AFFIRM

The appellee moves this Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the U. S. District Court for the Northern District of Alabama on the following grounds:

1. The appeal does not present a substantial Federal question.

2. The question asked of the Court by the appeal is so unsubstantial as not to need further argument.

STATEMENT

The question presented to this Court by the appellant is somewhat misleading in that the "state practice" referred to one county sheriff out of 67 in the State of Alabama, and there was no evidence in this case that the remaining sixty-six sheriffs were on a fee basis or a salary basis; and, as the record will show, there was no minimum number of traffic cases required of the deputies by the sheriff (R. 142-143).

The sheriff and his deputies testified that it has been made clear that the deputies were not to make an arrest for the traffic offense of speeding unless the motorist was going 65 miles per hour at night and 75 miles per hour in the daytime — this is 15 miles per hour over the legal limits (R. 70, 134-135). The deputies further testified that they had specific instructions from the sheriff to enforce the law impartially and to arrest only those who were violating the law (R. 70, 134-135). There was no testimony in the record that supports the statement that the sheriff of Bibb County, Alabama had required his deputies to make a minimum number of arrests.

The procedure followed by the sheriff and his deputies in arresting persons deemed to be violating the traffic laws of Alabama was to stop the motorist, ask for his driver license, inform him of the infraction, give him a copy of the citation, permit him to sign his own recognizance, fix a date for trial and permit the motorist to be on his way. However, if the motorist wished an immediate hearing before a magistrate, the officer would forthwith take the offender to the magistrate for a hearing (R. 124-125). The testimony showed there were very few trials, with most of the offenders pleading guilty (R. 71-72).

The evidence does show that the bulk of the traffic cases made by the Bibb County, Alabama Sheriff's Office

were placed in the various Justices of the Peace Courts in the county (Plaintiff's Exhibits 18, 20, 22). But it also shows that after the temporary injunction was issued by the District Court to the Justices of the Peace in Bibb County, the cases were then placed in the Circuit Court of Bibb County, Alabama — the Court of general jurisdiction in the State of Alabama[1] (R. 63-64). And, in view of the fact that a permanent injunction has been issued against the Bibb County Justices of the Peace, all of the traffic cases made in Bibb County, Alabama, by whatever law enforcement agency, will go to the Circuit Court of Bibb County, Alabama in the future (App. 10a).

ARGUMENT

The Decision of the U. S. District Court for the Northern District of Alabama was correct and therefore no substantial Federal question is presented by this appeal.

The record in this case clearly shows that the sheriff of Bibb County, Alabama was on a "fee" basis so far as income for the operation of his office was concerned (R. 50). That is, he did not receive a salary, but received fees for the various duties he was required by law to perform.

But there was no evidence to show that the sheriff and his deputies were doing anything other than enforcing the

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[1]Title 13, Section 126(1), (2), (3), Code of Alabama 1940, as Recompiled 1958:

"The circuit court has authority:

"1. To exercise original jurisdiction of all felonies and misdemeanors; of all actions for libel, slander, assault and battery and of ejectments without regard to the amount involved; and of all other suits and actions at law when the matter or sum in controversy exceeds fifty dollars; and in all causes in equity.

"2. To exercise appellate jurisdiction of all civil actions and criminal cases cognizable before a county court or court of like jurisdiction, or a justice of the peace, or court created in lieu thereof, and in such other cases as may be provided by law.

"3. To exercise a general superintendence over all inferior jurisdictions."

laws — mainly traffic laws — of the State of Alabama, and the District Court pointed out that there was no conspiracy between the sheriff and the Justices of the Peace alleged or proved (App. 7a and 8a).

In fact, the evidence shows that the sheriff issued specific orders to his deputies not only to enforce the law but to do so in an impartial manner (R. 134-135).

There was never any question that the sheriff and his deputies were operating on the quota system in making arrests until this appeal.

Granted, the sheriff would not have any income if he and his deputies did not make arrests, but as the District Court said, to receive fees for the arrest is not a violation of due process, but merely an incentive to the officers to be diligent in enforcing the laws of the State (App. 8a).

Furthermore, the District Court hinted that *Tumey vs. Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, favored police officers being given incentives to enforce the law. However this may be, *Tumey* certainly did not, in any way, indicate that police officers were in the same category as Judges so far as receiving fees for carrying out their duties. The District Court also said that the facts in the case on appeal certainly did not warrant it in extending *Tumey* to a sheriff and his deputies (App. 8a).

The two cases cited by appellant, *Hill vs. United States*, 328 F. 2d 988 (5th Cir. 1964) and *Williamson vs. United States*, 311 F. 2d 441 (5th Cir. 1963), to suggest that maybe the U. S. Supreme Court in *Tumey* had gone too far in saying that the states could and probably should reward law enforcement officers for their diligence in arresting law violators, were concerned with the problem of entrapment of innocent persons. The record is clear in this case that the offenses were committed in the presence of the arresting officer, and the question of entrapment was never raised (R.

124). In fact, the undisputed evidence shows that most of those arrested pleaded guilty to the charge made against them (R. 71, 72).

Tumey clearly authorized a State, through its Legislature, to dispose of fines in criminal cases as it saw fit, and I would suggest to this Court that costs imposed by the trial court pursuant to statute should be similarly treated.

And *Tumey* also authorized a State to offer rewards to law enforcement officers for their strict enforcement of the law. The rewards in the case at bar were given by the sheriff to his deputies as an incentive to be diligent in their enforcement of the traffic laws of the State of Alabama in Bibb County.

Furthermore, no case has been cited to this Court by the appellants contrary to the holding in *Tumey* and the judgment of the District Court now the subject of this appeal.

CONCLUSION

It is respectfully submitted that the judgment of the U. S. District Court for the Northern District of Alabama should be affirmed and the appeal therefrom dismissed.

Respectfully submitted,

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Attorney General
State of Alabama

ROBERT P. BRADLEY
Assistant Attorney General
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Administrative Building
Montgomery, Alabama 36104
Attorneys for Appellee

CERTIFICATE OF SERVICE

I, Robert P. Bradley, one of the attorneys for appellee, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13 day of November, 1968, I served a copy of the foregoing motion to dismiss or affirm, upon Honorable Harvey M. Burg, one of the attorneys for appellant, 1630 Fourth Avenue North, Birmingham, Alabama 35203, by depositing the same in the United States mail, first class postage prepaid, and properly addressed to him at the address given.

ROBERT P. BRADLEY
Assistant Attorney General
State of Alabama

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Montgomery, Alabama 36104

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

BENNETT ET AL. *v.* COTTINGHAM ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 665. Decided January 13, 1969.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

THE CHIEF JUSTICE, MR. JUSTICE HARLAN and MR. JUSTICE BRENNAN are of the opinion that probable jurisdiction should be noted.